Monday November 23, 2020

TO: OAL Reference Attorney staff@oal.ca.gov
CC: Christina Shupe cshupe@dir.ca.gov

Re: OAL File # 2020-1120-01E
Occupational Safety and Health Standards Board COVID-19 Prevention

To the Reference Attorney(s):

Thank you for the opportunity to comment on the above-referenced emergency regulation. The comments presented to the Office of Administrative Law (OAL) are intended to be consistent with the limited review of emergency regulations as provided in the Administrative Procedures Act (APA).

It should be noted, however, that the Occupational Safety and Health Standards Board (Board) has placed these regulations into the emergency regulation process at a time that makes the five-calendar day requirement for comment include a weekend and the generally accepted holiday season associated with Thanksgiving. This is yet another example of the combined effort by the Board and the Division of Occupational Safety and Health (Cal/OSHA) to makes these regulations enforceable without the appropriate dialogue that should occur with stakeholders before a standard of this magnitude is thrust upon the employer community.

Cal-OSHA Reporter [cal-osha.com] since 1972 is the journal of record for Cal/OSHA in California. It has covered Cal/OSHA, the Standards Board, and the Appeals Board since their inception, before actually. I believe we have never provided written commentary before this on any proposals preferring to remain objective news media and the community's paper.

However today, as publisher I write as part of the safety and health community. A part who is very concerned both with the safety of employees and with employers' ability to respond to proposed regulations and to be able to comply if when they become in force.

So concerned, in fact, that for the reasons listed below we have retained at our own expense our own consultant to assist with the drafting of this response. OAL's diligent discernment and contemplation of the issues we present below is appreciated.

Limited OAL Review Process. On Thursday, November 19, the Board held a hearing on proposed emergency regulations relating to "COVID-19 Prevention". The regulations are voluminous (23 pages). The next day, OAL indicates these regulations were submitted to it by the Board and notice of that submission was posted on the OAL website.

Under the Administrative Procedures Act (APA), there is limited review by the OAL of emergency regulations. Per Government Code § 11349.6(b):

> "Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. After posting a notice of the filing of a proposed emergency regulation on its Internet Web site, the office shall allow interested persons five calendar days to submit comments on the proposed emergency regulations unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest. The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1."

The following comments are intended to address issues with the proposed emergency regulations within the context of the APA.

Emergency/Necessity. As stated in the APA,

> "A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." [Government Code § 11346.1(b)(2)]

While no one would question the scope and urgency of the crisis that is the COVID-19 pandemic, it is appropriate to question why, over nine months following Governor Newsom's declaration of a State of Emergency, the Board is only now – and only a couple of weeks before an effective vaccine will be approved by the FDA and distributed by the United State military and quickly provided to the people through pharmacies and other means - attempting to issue an occupational safety and health standard related to COVID-19 prevention in the workplace and is doing so as an emergency regulation.

Cal/OSHA's own enforcement record demonstrates that emergency regulations are not appropriate to address the issues the Board seeks to address. This is particularly important in light of the many enforcement actions Cal/OSHA has already taken.

On September 9, Cal/OSHA issued citations to frozen food manufacturer Overhill Farms Inc. and its temporary employment agency Jobsource North America Inc. with over $200,000 in proposed penalties to each employer. The citations were issued for failing to protect hundreds of employees from COVID-19 at two plants in Vernon. https://www.dir.ca.gov/DIRNews/2020/2020-78.html Per Cal/OSHA's announcement,

> "The employers did not take any steps to install barriers or implement procedures to have employees work at least six feet away from each other and they did not investigate

> any of their employees' COVID-19 infections, including more than 20 illnesses and, in the case of Overhill Farms, one death."

The inspections resulting in these enforcement actions commenced on April 28, 2020.

On September 30, Cal/OSHA announced it cited five grocery stores in Southern California for failing to protect their employees from COVID-19. https://www.dir.ca.gov/DIRNews/2020/2020-83.html Included in this announcement were the following statements:

> "The grocery stores…owned and operated by Cincinnati-based Kroger Company, were cited for failing to protect workers from exposure to COVID-19 because *they did not update their workplace safety plans* to properly address hazards related to the virus." (emphasis added)

Also pertinent to the substance of this emergency regulation:

> "Cal/OSHA inspectors determined that both the Culver City and West Hollywood locations failed to provide effective training for their employees, including instruction on how the virus is spread, measures to avoid infection, signs and symptoms of infection, and how to safely use cleaners and disinfectants."

We must ask why these, and other enforcement actions are not referenced in the Board's Finding of Emergency accompanying the proposed regulations.

Furthermore, a review of the citations issued shows that Cal/OSHA has exercised its authority to enforce existing regulations regarding IIPPs in the context of workplace COVID-19 exposure. See: https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Jobsource-North-America-Inc._1484808%E2%80%93Plant2.pdf

This not only demonstrates the lack of an emergency – within the context of the APA – but also fails to demonstrate that these regulations are even necessary. [See: Government Code § 11349(a)]

As will be noted in the discussion below of consistency and clarity of the proposed emergency regulations, the is also a significant issue regarding whether these proposed regulations are in conflict with Assembly Bill 685 (Reyes) which becomes effective January 1, 2021. In this context, Cal/OSHA and the California Department of Public Health (CDPH) have published significant compliance guidance for employers as they prepared for January 1:

Cal/OSHA: https://www.dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html

CDPH: https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-AB-685-Definitions.aspx

CDPH: https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Questions-about-AB-685.aspx

Given the amount of already existing enforcement actions, the guidance being provided already to employers, and the efforts well underway to implement AB 685, it is, respectfully, but abjectly not correct for the Board to claim in its Finding of Emergency:

> "The proposed emergency action is necessary to combat the spread of COVID-19 in California workers. The proposed regulation would significantly reduce the number COVID-19 related illnesses, disabilities and deaths in California's workforce."

It should also be noted that while the Board cites COVID-19 claims from the general population, it fails to reference the "COVID-19 & Non-COVID-19 Interactive App" published by the California Workers' Compensation Institute (CWCI): https://www.cwci.org/CV19claims.html

Had they done so, they would have noted more than simply saying,

> "Data for the number of cases of COVID-19 infection and number of deaths attributable to workplace exposure to COVID-19 is not currently available; however, the numbers are likely substantial, particularly among essential workers, due to workers' exposure to persons outside of those in one's household, along with the close proximity between persons required in some industries."

The CWCI numbers identify claims that have been filed for workers' compensation benefits. This is not represented to be the entire universe of workers who may have contracted COVID-19 in the workplace. It is, however, an indication that as reflected in workers' compensation claims the number is relatively small when compared to the community as a whole, and of those claims some 30% are denied because of negative tests.

More to the point, however, is that the lack of reference to easily available data, both from CWCI and other sources, calls into question the adequacy of the Finding of Emergency. See generally: 1 CCR § 50(c).

Authority. <u>The Board is improperly amending Injury and Illness Prevention Program requirements through this regulatory process.</u>

The Board cites as its authority for these regulations Labor Code § 142.3. Paragraph (1) of subdivision (a) of that section states:

> "The board, by an affirmative vote of at least four members, may adopt, amend or repeal *occupational safety and health standards* and orders. The board shall be the only agency in the state authorized to adopt occupational safety and health standards." (emphasis added)

Per the Federal Occupational Safety and Health Administration (OSHA), the term occupational safety and health standard, "…means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." [29 U.S. Code § 652(8)]

Also, per OSHA, an Injury and Illness Prevention Program (IIPP) is a proactive process to help employers find and fix workplace hazards before workers are hurt. See: Injury and Illness Prevention Programs - Frequently Asked Questions (osha.gov)

The term "injury and illness prevention program" does not appear in Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code. And yet, the Board is citing Labor Code § 142.3 of the Labor Code as its authority to make considerable amendments to IIPPs.

It is Labor Code § 6407.1 which sets forth the obligations of an employer to develop and effectively implement an IIPP. That authority is consistent with the OSHA definitions. Furthermore, the current Board standard for IIPPs, authorized under Labor Code § 6407.1(e), explains how an effective IIPP should be created, implemented, and documented, but does not in and of itself contain "occupational safety and health" standards. The Board's authority to adopt a standard related to an IIPP is limited by the authority in Labor Code § 6401.7(e) as reflected in current 8 CCR § 3203.

Nevertheless, proposed 8 CCR § 3205(c) states,

> "Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program, which may be integrated into the employer's Injury and Illness Program required by section 3203, or be maintained in a separate document."

Many of the requirements in proposed 8 CCR § 3205(c) are not IIPP standards but are instead occupational safety standards. These include occupational safety standards relating to physical distancing, proposed 8 CCR § 3205(c)(6); face coverings, proposed 8 CCR § 3205(c)(7); other engineering controls, proposed 8 CCR § 3205(c)(8); exclusion of COVID-19 cases, 8 CCR § 3204(c)(10); and return to work criteria, proposed 8 CCR § 3205(c)(11).

There is no authority to use the IIPP as a vehicle to bypass either the Legislature or the rule-making process for occupational safety standards. If the Legislature had intended to authorize this, it would not have codified the limited standards setting authority in Labor Code § 6401.7(e) for IIPPs. There is also nothing in Labor Code § 142.3 which expressly or impliedly grants authority to create occupational safety standards as part of regulations setting forth the requirements of injury and illness protection programs. See generally: 1 CCR § 14(a).

The Board is seeking to address issues that are outside the scope of its statutory authority.

Proposed 8 CCR §§ 3205(c)(3)(C) and 3205(c)(3)(D) require personal identifying information and medical information of "COVID-10 cases" and persons with COVID-19 symptoms to be kept confidential. First, there is no authority whether in Labor Code § 6401.7 or in the general authority of the Board to adopt occupational safety standards to add privacy requirements of personal identifying information or medical information confidential.

In this regard, it is important to note that the Confidentiality of Medical Information Act specifically exempts from its requirements information and records acquired and maintained or disclosed pursuant to Division 5 (commencing with Section 6300) of the Labor Code [Civil Code § 56.30(e)]. These exemptions extend to information and records acquired, maintained, or disclosed pursuant to Division 1 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section 6100), and Division 4.7 (commencing with Section 6200) of the Labor Code [Civil Code § 56.30(f), and information and records sought as part of an investigation of an on-the-job accident or illness pursuant to Division 5 (commencing with Section 6300) of the Labor Code [Civil Code § 56.30(h)].

Second, these privacy requirements are in direct conflict with the general workers' compensation requirements for claims administration. (See Labor Code § 5401). More recently, specific obligations have been imposed on an employer to provide personal information to a claims administrator when a worker tests positive for COVID-19 and indicates the exposure is occupational. Labor Code § 3312.88(i)(1), part of SB 1159 (Hill), states:

> "For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 *unless* the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401." (emphasis added)

SB 1159 was an urgency measure and became effective September 17.

In addition, proposed 8 CCR § 3205(c)(10)(C) states:

> "For employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation."

This has nothing to do with safety, unless one adopts an existential approach to occupational safety standards well beyond what the Legislature has decided to do. More to the point, however, is that this is one more issue that has already been addressed in Assembly Bill 685. Specifically, Labor Code § 6409.6(a)(3) states that an employer receives notice of a potential exposure to COVID-19, it must:

> "Provide all employees who may have been exposed and the exclusive representative, if any, with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as antiretaliation and antidiscrimination protections of the employee."

There is no "emergency" that would require a notice for one month prior to the effective date of AB 685. More to the point, however, is that should be noted as of this writing, these supplemental paid sick leave benefits are scheduled to end on December 31, 2020.

Clarity/Consistency. As will be noted in a number of discussions by other organizations regarding the proposed regulations, the inconsistent terminology used in the regulations relative to the same issues being addressed in Labor Code § 3212.88 (SB 1159) and Labor Code § 6409.6 (AB 685) raise an issue of whether the proposed regulations lack the consistence and clarity as defined in Government Code §§ 11349 (b) and (d).

Regulations are required to be, "…in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." As will be demonstrated, the proposed regulations clearly fail this requirement.

The proposed emergency regulation and AB 685 use different terms when defining who is a case for purposes of providing notices. Specifically, a "Qualifying individual" per Labor Code § 6409.6(d)(4) may be based upon a diagnosis, which is not used in the regulation. A diagnosis would trigger notice

requirements under AB 685 without requiring notices (which are also to different people) under the regulation. If a worker then tests positive under an appropriate test, then the regulation would also trigger and require another set of notices.

This is because the proposed regulation requires notices to go to employees and authorized representative and also to "independent contractors and other employers present at the workplace during the high-risk exposure period." See: proposed 8 CCR § 3205(b). Labor Code § 6409.6(a)(1), however, requires notice to go to, "…all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual."

Conclusion.

There will be multiple organizations representing employers who will point to other flaws in this regulatory effort. The point is that the rush to do *something, anything* must not be allowed to create an environment where what already is being done is considered of no value.

There is simply no need for this regulation, as past experience and soon to be effective laws clearly demonstrate.

Thank you for your attention and consideration,

/s/ j dale debber
J Dale Debber

Publisher
Cal-OSHA Reporter

JDD:abm